

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA GAS TRANSMISSION  
CORPORATION,

Plaintiff,

v.

AN EASEMENT TO CONSTRUCT,  
OPERATE AND MAINTAIN A 24-INCH  
GAS TRANSMISSION PIPELINE ACROSS  
PROPERTIES IN CHESTER COUNTY,  
PENNSYLVANIA, OWNED BY JAY PAR  
AND PAR ANBIL, et al. and UNKNOWN  
PERSONS AND INTERESTED PARTIES,

Defendants.

C.A. No. 02-CV-3733

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO STRIKE OR DISMISS COUNTERCLAIM FILED  
BY DEFENDANTS SCOTT R. AND KERSTIN R. MARCUM**

Columbia Gas Transmission Corporation (“Columbia”) files the following  
Memorandum of Law in Support of Motion to Strike or Dismiss Counterclaim Filed by  
Defendants Scott R. and Kerstin R. Marcum (the “Marcums”).

**INTRODUCTION**

Columbia initiated condemnation proceedings pursuant to the Natural Gas Act, 15 U.S.C. §§ 717-717z and Federal Rule of Civil Procedure 71A. Columbia already owns a pipeline easement over property owned by the Marcums and has owned, operated and maintained a 10-inch natural gas pipeline along that right-of-way. Pursuant to its FERC certificate, Columbia intends to remove the existing 10-inch pipeline and replace it with a 24-inch pipeline along the same right-of-way. Columbia filed a Complaint to condemn the right-of-way and the Marcums filed an Answer and Counterclaim in Response.

**ARGUMENT**

**Columbia's Motion to Strike or Dismiss the Marcums'  
Counterclaim Should be Granted Because Only  
An Answer Is Permitted Under Fed. R. Civ. P. 71A**

Rule 71A of the Federal Rules of Civil Procedure governs the procedures to be followed in condemnation actions. Pursuant to Rule 71A(e), “[i]f a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within twenty days after the service of notice upon the defendant.” Fed. R. Civ. P. 71A(e). That section of the Rule goes on to state that, “[n]o other pleading or motion asserting any additional defense or objection shall be allowed.” Fed. R. Civ. P. 71A(e).

This section of the Rule has been interpreted by the Court to mean that counterclaims are not permitted. In United States v. Banisadr Building Joint Venture, 65 F.3d 374, 380 (4<sup>th</sup> Cir. 1995), the district court held and the appeals court affirmed that “the landowner’s lease-based counterclaim could not be asserted in the condemnation action because F.R.C.P. 71A – which governs condemnation cases – provides that other than an answer, no pleading or motion asserting any additional defense or objection shall be allowed by the defendant.” Specifically, the district court held that a “counterclaim, which would otherwise seem to be an appropriate vehicle for raising a claim. . . is therefore not permitted by the Federal Rules of Civil Procedure.” Id.

Another district court recently held that “[t]he last section of (e) states, ‘No other pleading or motion asserting any additional defense or objection shall be allowed.’ In other words, counterclaims are not permitted.” Kansas Pipeline Company v. A 200 Foot by 250 Foot Piece of Land, 2002 U.S. Dist. Lexis 12960, \*15-16 (D. Kan. 2002) citing Washington Metro Area Transit Authority v. Precision Small Engines, 227 F.3d 224, 228 n. 2 (4<sup>th</sup> Cir. 2000) (“Even

if Precision had properly preserved their argument on the ‘Counter Claim,’ it would not prevail in this Court because the ‘Counter Claim’ was not a permissible pleading” pursuant to Rule 71A(e)) and 12 Wright & Miller, Federal Practice and Procedure § 3048 (2d ed. 1987). See also United States v. 113, 445 Rentable Square Feet of Space, 1989 U.S. Dist. LEXIS 7399, \*12 (D.D.C. 1989) (“Rule 71A outlines a streamlined procedure for condemnation, from which even counterclaims are prohibited.”); United States v. 1.58 Acres of Land, 523 F.Supp. 120, 122 (D. Mass. 1981) (holding that the only pleading permitted in response to a complaint in condemnation is an answer, not a counterclaim); United States v. 1440.35 Acres of Land, 438 F. Supp. 1070 (D.Md. 1977) (“A counterclaim, which would otherwise seem to be an appropriate vehicle for raising a claim. . . is therefore not permitted by the Federal Rules of Civil Procedure.”)<sup>1</sup>

In accordance with Federal Rule of Civil Procedure 71A, Columbia requests that the Court strike or dismiss the Marcums’ Counterclaim. Dismissal of the Marcums’ Counterclaim will not prejudice the Marcums in any way because the declaratory judgment sought in their Counterclaim merely duplicates the objections raised in their Answer. Striking or dismissing the Counterclaim does not affect the Marcums’ right to contest the amount of just compensation due for the taking.

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<sup>1</sup> Some courts have declined to entertain counterclaims in condemnation proceedings for other reasons. In Maritimes & Northeast Pipeline, L.L.C. v. 16.66 Acres of Land, 190 F. R. D. 15 (D. Me. 1999), the court dismissed defendant’s counterclaim because it did not have jurisdiction over non-compulsory counterclaims. That Court did not discuss the effect of Fed. R. Civ. P. 71A(e), because no objection based on the Rule was raised. See id. Similarly, in United States v. 6.321 Acres of Land, 479 F.2d 404, 407 (1<sup>st</sup> Cir. 1973), the Court dismissed defendant’s counterclaim holding that it lacked jurisdiction over the counterclaim, which fell within the requirements of the Tucker Act. Further, that court found that Rule 71A did not effect a waiver of the government’s sovereign immunity, so counterclaims were not permitted. See id. Finally, in Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement, 747 F. Supp. 401 (N. D. Ohio, 1990), the court found that a counterclaim based on state law was preempted by federal law and so dismissed the claim.

CONCLUSION

Based on the foregoing, Columbia requests that the Court grant Columbia's Motion to Strike or Dismiss Counterclaim Filed by Defendants Scott R. and Kirstin R. Marcum.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing has been served by first class mail, postage prepaid, upon the following:

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